

Apr 23, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL G.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:18-CV-00164-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 16, 17. Attorney Cory J. Brandt represents Michael G. (Plaintiff); Special Assistant United States Attorney Justin Lane Martin represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 4. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. §§ 405(g), 1383(c).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on October 28, 2014, Tr. 76-77, alleging

1 disability since June 30, 2008, Tr. 154, 161, due to a back injury in 2008 followed
2 by surgery, right leg sciatica, and nerve damage at L5-S1. Tr. 188. The
3 applications were denied initially and upon reconsideration. Tr. 92-94, 97-101.
4 Administrative Law Judge (ALJ) Jesse Shumway held a hearing on January 24,
5 2017 and heard testimony from Plaintiff, medical expert Lynn Jahnke, M.D. and
6 vocational expert Daniel McKinney. Tr. 34-65. The ALJ issued an unfavorable
7 decision on March 9, 2017. Tr. 15-27. The Appeals Council denied review on
8 March 13, 2018. Tr. 1-6. The ALJ's March 9, 2017 decision became the final
9 decision of the Commissioner, which is appealable to the district court pursuant to
10 42 U.S.C. §§ 405(g), 1383(c). Plaintiff initiated this action for judicial review on
11 May 18, 2018. ECF Nos. 1, 7.

12 **STATEMENT OF FACTS**

13 The facts of the case are set forth in the administrative hearing transcript, the
14 ALJ's decision, and the briefs of the parties. They are only briefly summarized
15 here.

16 Plaintiff was 32 years old at the alleged date of onset. Tr. 154. At
17 application, he reported that he completed two years of college in 2006. Tr. 189.
18 His reported work history includes being an apprentice repair technician at a heavy
19 equipment dealership, a day laborer, and a production supervisor in the food
20 industry. *Id.* When applying for benefits Plaintiff reported that he stopped
21 working on October 31, 2013 because of his conditions, but he had also made
22 changes in his work activity as early as February 20, 2008. Tr. 188. At the
23 hearing, Plaintiff clarified that in 2001 he worked as a cabinetmaker for three
24 months, from 2003 and 2004 he worked building custom doors, from 2004 to 2005
25 he worked in woodworking at night while he attended school, and from 2006 to
26 2008 he worked as an entry level mechanic for heavy equipment. Tr. 47-51.

27 Plaintiff was injured on February 20, 2008 and underwent a lumbar
28 discectomy on July 3, 2008. Tr. 797, 862. Following surgery, Plaintiff worked for

1 Vista Utilities in 2012 inspecting gas meters and at Manpower in 2013 as a forklift
2 driver. Tr. 40-41. He also attended school in 2011 and 2012 to learn how to repair
3 hospital equipment. Tr. 41, 59.

4 **STANDARD OF REVIEW**

5 The ALJ is responsible for determining credibility, resolving conflicts in
6 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
7 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
8 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
9 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
10 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
11 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
12 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
13 another way, substantial evidence is such relevant evidence as a reasonable mind
14 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
15 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
16 interpretation, the court may not substitute its judgment for that of the ALJ.
17 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
18 findings, or if conflicting evidence supports a finding of either disability or non-
19 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
20 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
21 evidence will be set aside if the proper legal standards were not applied in
22 weighing the evidence and making the decision. *Browner v. Secretary of Health*
23 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

24 **SEQUENTIAL EVALUATION PROCESS**

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
27 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
28 through four, the burden of proof rests upon the claimant to establish a prima facie

1 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
2 burden is met once the claimant establishes that physical or mental impairments
3 prevent him from engaging in his previous occupations. 20 C.F.R. §§ 404.1520(a),
4 416.920(a)(4). If the claimant cannot do his past relevant work, the ALJ proceeds
5 to step five, and the burden shifts to the Commissioner to show that (1) the
6 claimant can make an adjustment to other work, and (2) the claimant can perform
7 specific jobs which exist in the national economy. *Batson v. Comm’r of Soc. Sec.*
8 *Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant cannot make an
9 adjustment to other work in the national economy, a finding of “disabled” is made.
10 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

11 ADMINISTRATIVE DECISION

12 On March 9, 2017, the ALJ issued a decision finding Plaintiff was not
13 disabled as defined in the Social Security Act from June 30, 2008 through the date
14 of the decision.

15 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
16 activity since June 30, 2008, the alleged date of onset. Tr. 17.

17 At step two, the ALJ determined that Plaintiff had the following severe
18 impairment: degenerative disc disease of the lumbar spine. Tr. 17.

19 At step three, the ALJ found that Plaintiff did not have an impairment or
20 combination of impairments that met or medically equaled the severity of one of
21 the listed impairments. Tr. 19.

22 At step four, the ALJ assessed Plaintiff’s residual function capacity and
23 determined he could perform a range of light work with the following limitations:

24 the claimant requires a sit/stand option at will; he can stand and walk in
25 combination only two hours total in an eight-hour day, thirty minutes
26 at a time; he can frequently reach; he cannot climb ladders, ropes, or
27 scaffolds, and can perform all other postural activities only
28 occasionally; he can have no concentrated exposure to extreme cold or
vibration; he cannot be exposed to hazards, such as unprotected heights

1 or moving mechanical parts; and he cannot operate a motor vehicle.

2 Tr. 19. The ALJ identified Plaintiff's past relevant work as heavy equipment
3 mechanic and door maker and found that he could not perform this past relevant
4 work. Tr. 25.

5 At step five, the ALJ determined that, considering Plaintiff's age, education,
6 work experience and residual functional capacity, and based on the testimony of
7 the vocational expert, there were other jobs that exist in significant numbers in the
8 national economy Plaintiff could perform, including the jobs of production
9 assembler, electronics worker, and mail sorter. Tr. 25-26. The ALJ concluded
10 Plaintiff was not under a disability within the meaning of the Social Security Act
11 from June 30, 2008, through the date of the ALJ's decision. Tr. 27.

12 ISSUES

13 The question presented is whether substantial evidence supports the ALJ's
14 decision denying benefits and, if so, whether that decision is based on proper legal
15 standards. Plaintiff contends the ALJ erred by (1) failing to find Plaintiff's
16 depression and anxiety as medically determinable at step two, (2) failing to
17 properly address the medical opinions in the file, (3) failing to properly address
18 Plaintiff's symptom statements, and (4) failing to make a proper step five
19 determination.

20 DISCUSSION¹

21 1. Step Two

22 Plaintiff argues that the ALJ erred at step two by failing to find his anxiety
23 and depression medically determinable. ECF No. 16 at 11-13.

24 At step two of the sequential process, the ALJ must determine whether a
25

26
27 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
28 that ALJs of the Securities and Exchange Commission are "Officers of the United

1 claimant suffers from a “severe” impairment. 20 C.F.R. §§ 404.1520(c),
2 416.920(c). To show a severe impairment, the claimant must first establish the
3 existence of a medically determinable impairment by providing medical evidence
4 consisting of signs, symptoms, and laboratory findings; the claimant’s own
5 “statement of symptoms, a diagnosis, or a medical opinion is not sufficient to
6 establish the existence of an impairment.” 20 C.F.R. §§ 404.1521, 416.921.²
7 “[O]nce a claimant has shown that he suffers from a medically determinable
8 impairment, he next has the burden of proving that these impairments and their
9 symptoms affect his ability to perform basic work activities.” *Edlund v.*
10 *Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2001). If the claimant fulfills this
11 burden, the ALJ must find the impairment “severe.” *Id.*

12 Here, the ALJ found that Plaintiff’s anxiety and depression were not
13 medically determinable impairments:

14 Here, the claimant’s anxiety and depression are merely subjective
15 complaints without evidence supporting such impairments. The record
16 contains multiple examples of normal mental status examinations.
17 (Exhibits 6F, 9F, 11F, 15F 17F/7/22/35/49, 18F/60, 19F/33). Further,
18 the claimant denied depression and thoughts of self-harm on multiple
19 occasions. (*see e.g.*, 13F). As well, the claimant declined to use any
20 medication. Indeed, any anxiety or depression appears secondary to his
21 physical condition. (Exhibit 17F/50/71). He does not have a
22 psychological medically-determinable impairment.

23 States” and thus subject to the Appointments Clause. To the extent Lucia applies
24 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
25 their briefing. *See Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
26 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
27 specifically addressed in an appellant’s opening brief).

28 ²Prior to March 17, 2017, these requirements were set forth in 20 C.F.R. §§
404.1508, 404.1528, 416.908, 416.928 (2016).

1 Tr. 18.

2 The ALJ's first finding, that the record contains multiple examples of
3 normal mental status examinations (MSE), is not supported by substantial
4 evidence. The ALJ points to several locations in the record that demonstrate
5 normal MSEs. Tr. 18. However, several of these citations show abnormal
6 findings: Exhibit 6F includes an October 5, 2015 exam by David Anderson, PA
7 that found Plaintiff's judgment intact, orientation intact, memory intact, and mood
8 appropriate. Tr. 297. Exhibit 9F includes a May 23, 2016 exam showing
9 depressed, but not anxious affect. Tr. 311. It also includes a July 26, 2016 MSE
10 showing depressed mood and affect. Tr. 308. Exhibit 11F is from Spokane Ear,
11 Nose, and Throat Clinic and does not include a single MSE. Tr. 324-34. Exhibit
12 15F includes a September 2, 2009 evaluation showing Plaintiff to be anxious and
13 mildly unhappy. Tr. 515. It also includes a July 23, 2010 evaluation showing
14 "some very mild anxiety," and a September 7, 2010 evaluation showing mild
15 anxiety and flat affect. Tr. 499, 501. It includes exams from November 10, 2010,
16 May 6, 2011, August 5, 2011, November 9, 2011, February 2, 2012 which show
17 normal psychological evaluations. Tr. 472, 481, 484, 487, 504. However, it also
18 includes a January 22, 2016 exam showing depressed affect and mildly pressured
19 speech, Tr. 464, and an exam on February 1, 2016 showing depressed affect with
20 mild psychomotor retardation, Tr. 530. Exhibit 17F/7 includes a normal
21 psychological exam dated February 9, 2016. Tr. 586. Exhibit 7F/22 includes a
22 psychological evaluation with a depressed, but not anxious affect with mild
23 psychomotor retardation from March 23, 2016. Tr. 601. Exhibit 7F/34 (the ALJ
24 miscited this as 7F/35) includes a psychological evaluation with depressed affect
25 and mild pressured speech. Tr. 613. Exhibit 7F/49 includes a psychological
26 evaluation with depressed, but not anxious affect. Tr. 628. Exhibit 18F/60
27 includes a normal psychological evaluation dated January 22, 2009. Tr. 715.
28 Exhibit 19F/33 includes a normal psychological evaluation dated February 22,

1 2012. Tr. 787. While some of the ALJ's citations did show normal psychological
2 evaluations, most showed some abnormality. Therefore, his assertions that these
3 citations represent normal MSEs is not supported by substantial evidence.

4 The ALJ's second finding, that Plaintiff denied depression and thoughts of
5 self-harm on multiple occasions, is supported by substantial evidence but does not
6 fully represent the evidence the ALJ cites. *See* Tr. 18 *citing* Exhibit 13F. Exhibit
7 13F includes a December 24, 2015 evaluation in which Plaintiff denied depression,
8 suicidal ideation, and homicidal ideation. Tr. 376. However, it also includes a
9 February 14, 2016 evaluation in which Plaintiff reported being "quite stressed and
10 is highly anxious." The objective observations by the provider noted Plaintiff to be
11 anxious and tearful. *Id.* A single citation of Plaintiff's denial of depression does
12 not overcome the multiple evaluations showing depressed affect discussed above.
13 The Ninth Circuit has recognized that it is not abnormal for mental health
14 symptoms to wax and wane in the course of treatment. *Garrison v. Colvin*, 759
15 F.3d 995, 1017 (9th Cir. 2014). Therefore, Plaintiff denying symptoms at some
16 point during treatment is not sufficient to support a finding of no psychological
17 medically determinable impairments at step two.

18 The ALJ's third finding, that Plaintiff declined the use of medication,
19 misstates the record and is not supported by substantial evidence. Plaintiff was
20 prescribed Celexa for his depression and declined to fill the prescription. Tr. 310.
21 However, Plaintiff was also prescribed Alprazolam (Xanax) for his anxiety, *Id.*,
22 and had been since July 23, 2010, Tr. 745. Exhibit 17F/50 states that Plaintiff
23 reported that he wanted to deal with the symptoms of his anxiety and depression
24 without medications. Tr. 629. The ALJ's second citation, Exhibit 17F/71,
25 includes a notation by the provider that Plaintiff "continues to decline use of
26 antidepressant for either diagnosis." Tr. 650. However, both citations included a
27 current prescription on file for Alprazolam as needed for anxiety. Tr. 633, 650.
28 Therefore, the ALJ's conclusion that Plaintiff refused medication is not an accurate

1 representation of the record. Plaintiff was resistant to any medication prior to
2 starting Xanax for his anxiety. Tr. 729, 742. However, once he started Xanax,
3 there is evidence Plaintiff was taking it regularly. On February 9, 2016, Plaintiff
4 was given a script for fifteen pills. Tr. 586. By March 23, 2016, Plaintiff
5 requested a refill and stated he was using three pills a week. Tr. 600. By April 25,
6 2016, Plaintiff reported the dosage of Xanax was not helping and the provider
7 prescribed twice the strength. Tr. 612.

8 Plaintiff did consistently decline additional medication for depression. Tr.
9 629, 650. However, the ALJ's finding that Plaintiff refused medication misstates
10 the record because he was consistently taking medication for anxiety. Therefore,
11 the ALJ's determination is not supported by substantial evidence.

12 Defendant argues that any error at step two would be harmless because
13 ultimately, the step two decision was found in Plaintiff's favor. ECF No. 17 at 9-
14 10. In doing so, she cites *Lewis v. Astrue*, 498 F.3d 909 (9th Cir. 2007). ECF No.
15 17 at 9. However, in *Lewis*, the Ninth Court found any error to be harmless
16 because, while the ALJ did not consider plaintiff's bursitis at step two, the ALJ did
17 discuss the impairment in step four and accounted for any resulting limitations.
18 498 F.3d at 911. Here, since the ALJ did not find the depression or anxiety
19 medically determinable, he did not consider any resulting limitations at step four.
20 *See* S.S.R. 96-8p ("In assessing [residual functional capacity], the adjudicator must
21 consider limitations and restrictions imposed by all of an individual's impairments,
22 even those that are not 'severe.'").

23 Defendant also argues that any error would be harmless because Plaintiff
24 failed to point to any specific limitations arising from his depression or anxiety that
25 would have impacted the ALJ's analysis at step three or in the residual functional
26 capacity assessment. ECF No. 17 at 9. The Ninth Circuit has found that failing to
27 address an impairment at step two is not a reversible error when the claimant fails
28 to establish that the impairment would result in meeting or equaling a listing or

1 fails to specify limitations or restrictions in the residual functional capacity
2 assessment caused by the impairment. *Burch v. Barnhart*, 400 F.3d 676, 682-83
3 (9th Cir. 2005). In this case, Plaintiff specifically challenged the ALJ's rejection
4 of a treating provider's opinion that Plaintiff had marked limitations in his ability
5 to complete a normal workday and workweek without interruption from
6 psychologically based symptoms due to anxiety and depression. ECF No. 16 at
7 14-15. Evaluating limitations due to Plaintiff's anxiety and depression at step two
8 may necessitate reconsideration of the residual functional capacity at step four.

9 In conclusion, the ALJ erred in failing to find Plaintiff's anxiety and
10 depression as medically determinable impairments at step two. The error was
11 harmful, and a remand is necessary for the ALJ to make a new step two
12 determination.

13 **2. Medical Opinions**

14 Plaintiff argues the ALJ failed to properly consider and weigh the medical
15 opinions expressed by Douglas Hammerstrom, M.D. and David Anderson, PA.
16 ECF No. 16 at 13-17.

17 In weighing medical source opinions, the ALJ should distinguish between
18 three different types of physicians: (1) treating physicians, who actually treat the
19 claimant; (2) examining physicians, who examine but do not treat the claimant;
20 and, (3) nonexamining physicians who neither treat nor examine the claimant.
21 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
22 weight to the opinion of a treating physician than to the opinion of an examining
23 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
24 should give more weight to the opinion of an examining physician than to the
25 opinion of a nonexamining physician. *Id.*

26 **A. Douglas Hammerstrom, M.D.**

27 In July and September of 2016, Dr. Hammerstrom completed a
28 Psychological/Psychiatric Evaluation and a Physical Functional Evaluation for the

1 Washington State Department of Social and Health Services. Tr. 306-09, 313-17.
2 He opined that Plaintiff was unable to meet the demands of sedentary work due to
3 his herniated disc at L5-S1. Tr. 314-15. Additionally, he found that Plaintiff had a
4 marked limitation to complete a normal workday and workweek without
5 interruptions from psychologically based symptoms. Tr. 307. The ALJ assigned
6 little weight the physical limitations and the single marked psychological limitation
7 opined by Dr. Hammerstrom. Tr. 24. Additionally, Dr. Hammerstrom wrote a
8 letter on January 23, 2017 in which he stated Plaintiff “has certainly been disabled
9 for many months, but will not be ready for work for some time after surgery even
10 if successful.” Tr. 912. The ALJ also assigned little weight to this letter. Tr. 24-
11 25.

12 Considering the case is remanded for the ALJ to properly address Plaintiff’s
13 psychological symptoms at step two and Dr. Hammerstrom’s opinion includes
14 psychological limitations, the ALJ will readdress the opinion in full on remand.

15 **B. David Anderson, PA**

16 On October 5, 2015, Mr. Anderson opined that Plaintiff was limited to
17 sedentary work due to his lumbago. Tr. 301-02. He further opined that this
18 limitation would persist for twelve months with available medical treatment. Tr.
19 302. The ALJ assigned the opinion little weight. Tr. 24.

20 Considering the case is being remanded, and the ALJ is instructed to make a
21 new step two determination and to address Dr. Hammerstrom’s opinion, the ALJ
22 will also readdress Dr. Anderson’s opinion.

23 **3. Plaintiff’s Symptom Statements**

24 Plaintiff contests the ALJ’s determination that Plaintiff’s symptom
25 statements were unreliable. ECF No. 16 at 17-19.

26 The ALJ found Plaintiff’s statements concerning the intensity, persistence,
27 and limiting effects of his symptoms to be “not entirely consistent with the medical
28 evidence and other evidence in the record.” Tr. 20. The evaluation of a claimant’s

1 symptom statements and their resulting limitations relies, in part, on the assessment
2 of the medical evidence. *See* 20 C.F.R. §§ 404.1529(c), 416.929(c); S.S.R. 16-3p.
3 Therefore, in light of the case being remanded for the ALJ to readdress the medical
4 source opinions in the file, a new assessment of Plaintiff's subjective symptom
5 statements will be necessary.

6 **4. Step Five**

7 Plaintiff challenges the ALJ's step five determination because it was based
8 on an incomplete hypothetical presented to the vocational expert. ECF No. 16 at
9 19-20. Because a new step two determination and a new residual functional
10 capacity determination is required on remand, the ALJ will also make a new step
11 five determination.

12 **REMEDY**

13 Plaintiff urges the Court to apply the credit-as-true rule and remand this case
14 for an immediate award of benefits. ECF No. 16 at 20.

15 The decision whether to remand for further proceedings or reverse and
16 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
17 888 F.2d 599, 603 (9th Cir. 1989). Under the credit-as-true rule, where (1) the
18 record has been fully developed and further administrative proceedings would
19 serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons
20 for rejecting evidence, whether claimant testimony or medical opinion; and (3) if
21 the improperly discredited evidence were credited as true, the ALJ would be
22 required to find the claimant disabled on remand, the Court remands for an award
23 of benefits. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even when the
24 three prongs have been satisfied, the Court will not remand for immediate payment
25 of benefits if "the record as a whole creates serious doubt that a claimant is, in fact,
26 disabled." *Garrison*, 759 F.3d at 1021.

27 Here, the ALJ's error was in failing to identify Plaintiff's medically
28 determinable impairments at step two. While this error results in the need for a

1 new residual functional capacity determination, it does not trigger the credit-as-true
2 rule. Therefore, remand for additional proceedings is the appropriate remedy in
3 this case.

4 **CONCLUSION**

5 Accordingly, **IT IS ORDERED:**

6 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is
7 **DENIED**.

8 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is
9 **GRANTED, in part**, and the matter is **REMANDED** for additional proceedings
10 consistent with this order.

11 3. Application for attorney fees may be filed by separate motion.

12 The District Court Executive is directed to file this Order and provide a copy
13 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
14 **and the file shall be CLOSED.**

15 DATED April 23, 2019.



A handwritten signature in black ink, appearing to read "M", is written above a horizontal line.

17 JOHN T. RODGERS
18 UNITED STATES MAGISTRATE JUDGE
19
20
21
22
23
24
25
26
27
28